STATE OF MICHIGAN

IN THE SUPREME COURT

HIGHLAND-HOWELL DEVELOPMENT COMPANY, L.L.C.,

Petitioner-Appellant,

vs.

TOWNSHIP OF MARION,

Respondent-Appellee.

Supreme Court No. 130698

Court of Appeals Docket No. 262437

Michigan Tax Tribunal
Docket No. 307906

/

KATHLEEN McCREE LEWIS (P23843)
SHERRILL D. WOLFORD (P44085)
CHRISTINE MASON SONERAL (P58820)
Dykema Gossett PLLC
Attorneys for Petitioner-Appellant
400 Renaissance Center, 34th Floor
Detroit, MI 48243
(313) 568-6577

NEIL H. GOODMAN (P30751)
Clark Hill PLC
Attorneys for Respondent-Appellee
255 S. Old Woodward, Third Floor
Birmingham, MI 48009
(248) 988-5880

130698

RICHARD BISIO (P30246)
Kemp, Klein, Umphrey, Endelman & May, P.C.
Co-Counsel for Petitioner-Appellant
201 West Big Beaver Road, Ste. 600
Troy, Michigan 48084
(248) 740-5698

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RESPONDENT-APPELLEE TOWNSHIP OF MARION'S BRIEF IN OPPOSITION TO PETITIONER-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

CLARK HILL PLC

By: Neil H. Goodman (P30751)
Attorney for Respondent-Appellee
255 S. Old Woodward, Third Floor
Birmingham, Michigan 48009
(248) 988-5880

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1. Does collateral estoppel bar the relitigation of issues concerning the jurisdiction of the Michigan Tax Tribunal to entertain Petitioner's challenge to the special assessment for sanitary sewer service levied on its property in December of 1996, where these issues were previously litigated and decided by the Tribunal in a prior Petition and where Petitioner's application for leave to appeal the Tribunal's Final Decision and Judgment in that prior proceeding was denied for lack of merit in the grounds presented?

The Court of Appeals answered YES.

Petitioner/Appellant answers NO.

Respondent/Appellee answers YES.

2. Did Petitioner's allegations concerning compliance with the Public Improvements Act, and its associated requests for declaratory and injunctive relief arising therefrom, fall outside the Michigan Tax Tribunal's exclusive jurisdiction as set forth in MCL 205.731?

The Court of Appeals answered YES.

Petitioner/Appellant answers NO.

Respondent/Appellee answers YES.

3. Does the October 15, 2004 Opinion and Order of the Livingston County Circuit Court, which ruled that Respondent had no clear legal duty to construct an east-west sewer trunk line across Petitioner's property, bar relitigation of the claims and issues raised in the Petition below as they relate to the May 13, 2004 Resolution of Respondent's Board of Trustees formally approving and ratifying informal plan changes made in 1997?

The Court of Appeals did not answer this Question.

Petitioner/Appellant answers NO.

Respondent/Appellee answers YES.

4. Does Petitioner/Appellant's Application for Leave to Appeal fail to demonstrate a need for further appellate review based on the standards set forth in MCR 7.302(B)?

The Court of Appeals did not answer this Question.

Petitioner/Appellant answers NO.

Respondent/Appellee answers YES.

COUNTER-STATEMENT OF FACTS

Introduction

Petitioner/Appellant Highland-Howell Development Company, LLC ("Highland") seeks leave to appeal from the January 31, 2006 unpublished per curiam decision of the Michigan Court of Appeals below. In this decision, the Court of Appeals affirmed an Order of the Michigan Tax Tribunal ("MTT"), on reconsideration, granting summary disposition in favor of Respondent/Appellee Township of Marion ("Township").

In an earlier MTT Petition dated July 21, 1998, Highland sought to challenge a special assessment for sanitary sewer improvements levied on its property pursuant to the confirmation of a special assessment roll by the Township on December 2, 1996. This Petition was assigned MTT Docket No. 261431.

Highland's Petition in Docket No. 261431 alleged, inter alia, that the Township unlawfully made material changes in the sewer project plans, including the post-confirmation elimination of an east-west trunk line traversing Highland's property, which substantially reduced the benefits conferred on its property by the sewer improvements. A hearing on this Petition was held in the MTT in July of 2003, and the Tribunal's "Opinion and Judgment - - Final Decision on Proposed Judgment" was entered on March 19, 2004. In its March 19, 2004 Opinion and Judgment, the MTT affirmed the "Proposed Opinion and Judgment" of Administrative Law Judge Thomas A. Halick, which dismissed the Petition for lack of subject matter jurisdiction. Copies of the MTT's Opinion and Judgment and Judge Halick's Proposed Opinion and Judgment are included in the Township's Appendix as Exhibits 1 and 2, respectively ("A1 and A2").

In its Petition in the instant case, MTT Docket No. 307906, Highland sought to revive its failed challenge to the Township's sewer system plan changes by once again alleging that the Township's 1997 informal elimination of the east-west trunk line across its property, which was formalized by a Township Board Resolution adopted on May 13, 2004, substantially changed the benefit to Highland's property contrary to statute. In the alternative, Highland asserted that, due to this "changed benefit", its special assessment was not proportional to the benefit to its property. Copies of Highland's Petition in this case and the Township Board's May 13, 2004 "Resolution Ratifying Certain Changes In Plans for Sanitary Sewer Improvements" are included in the Township's Appendix as Exhibits 3 and 4, respectively ("A3 and A4").

Near the time it instituted its initial MTT Petition in July of 1998, Highland also brought an action in the Livingston County Circuit Court in which it asserted claims arising out of the Township's changes to the sewer improvements. After appeals to the Court of Appeals and this Court, that action returned to the Circuit Court and Highland filed a Third Amended Complaint on June 22, 2004 - - just 13 days subsequent to the filing of its MTT Petition in the instant case - - that included five counts.

Count 3 was entitled "Declaratory Judgment", and its substance was virtually identical to the claim asserted in its June 9, 2004 MTT Petition. A copy of Highland's Third Amended Complaint in the Livingston County Circuit Court action is included in the Township's Appendix as Exhibit 5 ("A5").

In a final Opinion and Order entered on October 15, 2004, the Livingston County Circuit Court granted the Township's motion for summary disposition on all five counts of Highland's Third Amended Complaint. As of that date, the Township's motion for summary disposition of the MTT Petition in the instant case was awaiting decision. Believing that the MTT should

consider the Circuit Court's Opinion and Order, the Township filed a motion to supplement its summary disposition brief to include the same. However, this motion literally crossed in the mail with the MTT's October 25, 2004 Order denying the parties' cross motions for summary disposition. Thus, the Township soon thereafter filed its motion for reconsideration of the MTT's denial of its summary disposition motion on November 5, 2004, arguing that the Circuit Court's October 15, 2004 Final Opinion and Order was res judicata and barred Highland from pursuing the claim in its Petition. Copies of the Township's motion for summary disposition with supporting brief, the Circuit Court's October 15, 2004 Opinion and Order, the MTT's October 25, 2004 Order denying the parties' Cross Motions for Summary Disposition, and the Township's November 5, 2004 motion for reconsideration with supporting brief are included in the Township's Appendix as Exhibits 6, 7, 8 and 9, respectively ("A6", "A7", "A8", and "A9"). Highland's appeal to the Court of Appeals from the Livingston County Circuit Court's Opinion and Order was dismissed by stipulation of the parties in a Court of Appeals Order dated February 22, 2005; a copy of this Order is included in the Township's Appendix as Exhibit 10 ("A10").

In its April 15, 2005 Order Granting the Township's Motion for Reconsideration and Granting the Township's Motion for Summary Disposition, the MTT changed its view of the March 19, 2004 "Opinion and Judgment - - Final Decision on Proposed Judgment" in MTT Docket No. 261431, and concluded that it was indeed an adjudication on the merits "with regard to the questions of law and fact relevant to the Tribunal's lack of jurisdiction over the petition filed in Docket No. 261431". The MTT's April 15, 2005 Order did not address the Township's argument concerning the res judicata effect of the Circuit Court's October 15, 2004 Opinion and Order. A copy of the MTT's April 15, 2005 Order is included in the Township's Appendix as Exhibit 11 ("A11").

The Court of Appeals affirmed the MTT's Order granting summary disposition in the Township's favor in an unpublished per curiam decision dated January 31, 2006; a copy of this decision is included in the Township's Appendix as Exhibit 12 ("A12"). In its analysis, the Court of Appeals held that the dismissal of the petition in MTT Docket No. 261431 barred the petition in the instant case on the basis of collateral estoppel with respect to Highland's challenge to its December 2, 1996 special assessment. In reaching this holding, the Court of Appeals correctly observed that the issue of whether a change in the sewer plans after confirmation of the special assessment roll entitled Highland to mount an otherwise untimely challenge to its assessment "was already resolved in the prior petition ..." and was "actually and necessarily determined in the prior proceeding." Opinion, p. 5 (A12).

The Court of Appeals then separately analyzed Highland's claim of entitlement to declaratory and injunctive relief in relation to its challenge to the Township Board's May 13, 2004 Resolution formally approving and ratifying changes to the sewer plans (A4). In rejecting Highland's argument that these claims could be pursued in the Tax Tribunal, the Court of Appeals correctly determined that they were not within the Tribunal's exclusive jurisdiction because claims for 1) failure to comply with the Public Improvements Act and 2) an order compelling construction of a sewer line do not seek review "relating to ... special assessment ... under property tax laws" and do not seek "a refund or redetermination of a tax under the property tax laws." Opinion, p. 6 (A12).

Facts Material to Proceedings Below

In its April 15, 2005 Order below, the MTT relied on the findings of fact and conclusions of law made by MTT Administrative Law Judge Thomas A. Halick in his January 27, 2004 Proposed Opinion and Judgment in MTT Docket No. 261431 - - an Opinion and Judgment made

final by the MTT on March 19, 2004 (A2 and A1). In his 38-page Proposed Opinion and Judgment, Judge Halick made a number of findings and conclusions that are germane to Highland's Petition in the instant case, in which Highland sought to challenge its special assessment levied in December of 1996 based on the Township Board's Resolution of May 13, 2004.

Judge Halick's bedrock findings, based on the undisputed facts, were that Highland did not protest at the November 14, 1996 hearing as required by statute and did not file its Petition within 30 days of the December 2, 1996 special assessment roll confirmation; therefore, the assessments on the roll became "final and conclusive" under MCL 41.726(3). Because Highland's Petition was not filed until July of 1998, it was untimely. (A2, pp. 13-14).

In addressing Highland's argument that its filing delay should be excused because the Township informally changed the approved sewer plans after confirming the special assessment roll, Judge Halick first found that the Township had not made the plan changes in conformity with the applicable statute, MCL 41.725, "because it did not approve the changes to the plan by a resolution" (A2, p. 21). As stated at pages 23 and 26 of his Opinion and Judgment:

> ... during or after the hearing required under Section 724, the board may change the plans; but under Section 725 the board must finally approve the plans by resolution, with any changes made since the time of the hearing.
>
> * * *
>
> If changes are made after the confirmation of the special assessment roll, the statutory requirement that the board approve plans by resolution still applies. Therefore, before it could amend the plans to eliminate the trunk line, Respondent was required to pass a resolution for that purpose.

Judge Halick went on to find, however, that the Township's lack of formal action did not invalidate the special assessment roll or any individual assessment thereon (A2, p. 31).

The basis for this finding was that the controlling legislation, 1954 PA 188, "does not provide a remedy, penalty, or consequence for departing from statutory procedures in this present context. This departure ... does not provide legal authority to excuse the jurisdictional requirements in the Tax Tribunal Act in this case" (A2, p. 32).

In rejecting Highland's claim that barring it from contesting its special assessment under the circumstances would amount to a deprivation of due process, Judge Halick stated that "the tribunal has no authority to invoke Due Process ... to excuse or avoid the statutory jurisdictional requirements in this case" (A2, p. 20). Of final significance to the instant case, Judge Halick made the following finding concerning the Township's post-confirmation plan changes:

> The Tax Tribunal finds that in our present case, neither the official nor unofficial changes to the *plans* rendered the December 2, 1996 confirmation of the *roll* invalid, nor did it render any assessment on an individual property invalid.
>
> A2, p. 17.

Based on his above findings and conclusions, Judge Halick dismissed Highland's Petition in MTT Docket No. 261431 for lack of subject matter jurisdiction. This dismissal was affirmed and made final by the MTT in its "Opinion and Judgment - - Final Decision on Proposed Judgment" entered on March 19, 2004 (A1). Highland's Claim of Appeal to the Court of Appeals from the MTT's Opinion and Judgment was dismissed for lack of jurisdiction on May 26, 2004, and its Application for Leave to Appeal therefrom was denied "for lack of merit in the grounds presented" on August 13, 2004. Copies of these Court of Appeals Orders of May 26, 2004 and August 13, 2004 are included in the Township's Appendix as Exhibits 13 and 14, respectively ("A13" and "A14").

In response to Judge Halick's determination that the Township's post-confirmation plan change eliminating the east-west trunk line traversing Highland's property was not in conformity

with 1954 PA 188 because it was not made pursuant to a resolution, the Township's Board adopted such a resolution on May 13, 2004. Entitled "Resolution Ratifying Certain Changes In Plans for Sanitary Sewer Improvements", this Board action formally acknowledged, approved and ratified all plan changes made since the project plans were originally accepted, approved and ordered filed with the Township Clerk by resolution of March 16, 1996 (A4). This Resolution also rescinded all previous resolutions that were inconsistent therewith.

In its Petition below (A3), Highland alleged that the Township informally eliminated the east-west sewer trunk line across its property in violation of law, and that the Township's Board adopted the May 13, 2004 Resolution (A4) "purporting to approve changes in the plans for the sewer project, including elimination of the sewer trunk line across Highland's property" (A3, ¶10). Highland further alleged that the Township Board's unlawful conduct rendered the plan change void, or in the alternative that it substantially changed the benefit to Highland of the sewer improvements and thus rendered the special assessment disproportional to the benefit to the property (A3, ¶¶13-14). Highland concluded therefrom that it "is entitled now to challenge the amount of the special assessment on its property" (A3, ¶15).

At the same time Highland was seeking to revive its failed challenge to the special assessment for sewer improvements by attacking the validity of the Township Board's May 13, 2004 Resolution in MTT Docket No. 307906 below, it attempted to pursue the same challenge in the Livingston County Circuit Court action that had been remanded by this Court. See Highland-Howell Development Co, LLC v Twp of Marion, 469 Mich 673; 677 NW2d 810 (2004). In its Third Amended Complaint in that action, filed on June 22, 2004, Highland alleged in Count 3 - - Declaratory Judgment - - that the Township, in violation of law, informally eliminated the trunk

line traversing its property from the project plans in 1997 and formally eliminated the same line from the plans by Resolution of May 13, 2004 (A5, ¶¶24 and 25).

In his Opinion and Order granting the Township's motion for summary disposition on all five counts of Highland's Third Amended Complaint, Judge Stanley J. Latreille relied on the MTT's findings and conclusions in MTT Docket No. 261431 (A1 and A2) concerning the validity and effect of the changes made by the Township to the sewer project plans, including the elimination of the subject trunk line, after the special assessment roll was confirmed on December 2, 1996. Specifically, Judge Latreille ruled that based on the MTT's decision in Docket No. 261431, there was no genuine issue of fact as to whether the Township had validly and lawfully approved and ratified the informal plan changes of 1997 by its Board's May 13, 2004 Resolution (A7, p. 6).

Addressing the Declaratory Judgment claim in Count 3, which alleged that the Township had an obligation to build the sewer project according to the plans in existence on the December 2, 1996 roll confirmation date (including the trunk line across Highland's property) and that the Township could not make post-confirmation plan changes, Judge Latreille observed that Highland "essentially raises the same arguments that it used to support its claims in Counts I and II" (A7, p. 7). He then proceeded to rule that the Township was entitled to summary disposition "under several theories", including the absence of a genuine issue of material fact, the pendency of the same claim between the parties in the earlier filed MTT Petition in Docket No. 307906 (A3), and the lack of subject matter jurisdiction (A7, p. 8).

Ten days after Judge Latreille issued his October 15, 2004 Opinion and Order dismissing Highland's Third Amended Complaint, and absent knowledge of the same, the MTT entered its Order denying the parties' cross motions for summary disposition in Docket No. 307906 below.

In its October 25, 2004 Order, the MTT first found that the Township Board's May 13, 2004 Resolution eliminating the trunk line across Highland's property "is valid pursuant to MCL 41.725(1)(b)" (A8, p. 6). It then proceeded to find that its dismissal of Docket No. 261431 for lack of subject matter jurisdiction was not res judicata because it was not on the merits and because the facts in Docket No. 307906 had substantially changed and thus could not have been litigated in the prior proceeding (A8, p. 7).

In granting the Township's motion for reconsideration of the October 25, 2004 Order denying summary disposition, the MTT did not rely on the intervening ruling of Judge Latreille in the Livingston County Circuit Court case as the Township argued it should. Instead, the MTT revisited its earlier ruling and concluded that the March 19, 2004 "Opinion and Judgment - - Final Decision on Proposed Judgment" in Docket No. 261431 was indeed a "**final order**" that had the effect of severing Docket No. 261431 from Docket No. 266543(sic)[1] and dismissing Docket No. 261431 with prejudice" (A11, p. 3). This conclusion led the MTT to rule that the March 19, 2004 decision has res judicata effect and compels dismissal of the instant Petition:

> The Tribunal's March 19, 2004 final Opinion and Judgment dismissing Docket No. 261431 was an adjudication on the merits with regard to the questions of law and fact relevant to the Tribunal's lack of jurisdiction over the Petition filed in Docket No. 261431... The factual and legal conclusions in Docket No. 261431 are dispositive in this case and have res judicata effect. It has been ruled that the Tribunal lacks jurisdiction over the special assessment on the role (sic) that was validly confirmed on December 2, 1996, and that the role (sic) became final and conclusive and not subject to appeal 30 days after confirmation. No subsequent act or omission by Respondent changed that legal ruling.
>
> A11, p. 3.

Expanding on this ruling, the MTT further held as follows:

[1] Docket No. 261431 had been consolidated with Docket No. 266534 by MTT Order of November 1, 2000 (See Appellant's Appendix, Exhibit D4, p. 6).

The Tribunal's March 19, 2004 final Opinion and Judgment that dismissed Docket No. 261431 fully considered and rendered legal conclusions with regard to all issues pertaining to *official* or *unofficial* changes to the plans in relation to the jurisdiction of the Tribunal. It was held that the *unofficial* changes did not allow the Tribunal to assert jurisdiction over the special assessment role (sic) approved on December 2, 1996. The *official* resolution of Marion Township adopted May 13, 2004 that "acknowledged, approved and ratified" the change in the plans does not alter the previous ruling that the Tribunal lacks jurisdiction over the 1996 special assessment role (sic).

* * *

Therefore, the jurisdictional issues raised in the Petition filed in this case with regard to the special assessment roll confirmed December 2, 1996 have already been decided. It was previously ruled that changes in the plans, "official or unofficial", have no effect upon the validity and conclusiveness of the December 2, 1996 special assessment role (sic). The May 13, 2004 Resolution by the Township of Marion does not allow Petitioner to appeal the special assessment that was confirmed December 2, 1996. **"By law, the amounts assessed on the roll confirmed December 2, 1996 became final and conclusive 30 days after confirmation and cannot be overturned at this time. MCL 41.726(3)."** March 19, 2004 Opinion and Judgment – Final Decision on Proposed Opinion and Judgment.

The Tribunal's Order Denying Respondent's Motion for Summary Disposition entered October 25, 2004 did not fully take into account the March 19, 2004 Opinion and Judgment when it found that there were "still genuine issues of material fact as to whether the special assessment imposed on Petitioner's property is proportional to the benefit to the property by the sewer improvement project". Any issues of fact pertaining to the 1996 special assessment in Docket No. 307906 are not before the Tribunal because there is no jurisdiction over that appeal. There are no factual issues with regard to the lack of jurisdiction.

Based on the matters discussed above and the reasons set forth in Respondent's brief in support of its motion for summary disposition, this case shall be dismissed.

A11, pp. 3-5.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT COLLATERAL ESTOPPEL APPLIES TO PRECLUDE RELITIGATION OF THE ISSUE OF WHETHER THE TOWNSHIP'S ALLEGED FAILURE TO COMPLY WITH THE REQUIREMENTS OF THE PUBLIC IMPROVEMENTS ACT EXCUSED THE JURISDICTIONAL REQUIREMENTS OF MCL 205.735(1) AND (2).

In its decision below, after reviewing the "rather extensive" factual and procedural history of this case, the Court of Appeals began its analysis by noting that its review of the MTT's decision was limited to determining whether the MTT "committed an error of law or adopted a wrong legal principle", citing Michigan Milk Producers Ass'n v Dep't of Treasury, 242 Mich App 486, 490; 618 NW2d 917 (2000). Opinion, p. 4 (A12). The Court then proceeded to explain its rationale for holding that the doctrine of collateral estoppel precludes relitigation of issues actually and necessarily determined by the MTT in prior MTT Docket No. 261431.

The Court accurately stated that collateral estoppel "precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding," citing Barrow v Pritchard, 235 Mich App 478, 480; 597 NW2d 853 (1999). In addition, the Court accurately noted that for collateral estoppel to apply, "the same parties must have had a full and fair opportunity to litigate the issue," citing VanVorous v Burmeister, 262 Mich App 467, 480; 687 NW2d 132 (2004).

Applying these principles of collateral estoppel, the Court then focused on the facts and issues litigated by Highland and the Township in prior MTT Docket No. 261431 - - a proceeding

which required the MTT to determine whether post-confirmation changes in the plans for a sewer system can serve to excuse a property owner's failure to comply with the jurisdictional requirements of MCL 205.735(1) and (2). In so doing, the Court noted that the MTT made the following determinations in prior Docket No. 261431:

- It lacked jurisdiction over Highland's challenge to the 12/2/96[2] confirmation of the special assessment for sewer service because Highland did not satisfy the protest and appeal requirements of MCL 205.735(1) and (2);

- Neither official nor unofficial changes to the *plans* rendered the 12/2/96 confirmation of the special assessment *roll* invalid, nor did such plan changes render any assessment on any individual parcel of property invalid;

- There was no basis upon which the MTT could excuse Highland's failure to comply with the jurisdictional requirements of MCL 205.735(1) and (2), notwithstanding the Township's post-confirmation plan changes, because Highland's arguments were based on equity and due process and the MTT had no authority to invoke due process or equity to excuse statutory jurisdictional requirements;

- The Township's failure to change the sewer plans in accordance with the Public Improvements Act (by failing to adopt a formal resolution) did not give the MTT jurisdiction over Highland's challenge to its 12/2/96 assessment; and

- The Public Improvements Act does not provide a remedy, penalty, or consequence for departing from statutory procedures in the context of the Docket No. 261431 proceeding.

Opinion, p. 2 (A12).

With respect to the collateral estoppel doctrine's requirement that the prior proceeding must culminate in a valid final judgment, the Court of appeals below noted that Highland's claim of appeal from the MTT's "Opinion and Judgment - - Final Decision on Proposed Judgment" was dismissed for lack of jurisdiction (A13), and that its application for leave to appeal

[2] At page 2, line 3 of its Opinion below (A12), the Court of Appeals mistakenly states "1999" as the year of confirmation of the roll; subsequent references in the Opinion to "the December 2, 1996 assessment" make it clear that this is a mere typographical error.

therefrom, in which it argued that the MTT erred in ruling that its failure to comply with the requirements of MCL 205.735 deprived the Tribunal of jurisdiction over its challenge to the 12/2/96 special assessment, was denied "for lack of merit in the grounds presented." Opinion, p. 2 (A12; see also A14). While Highland argues at pages 43-44 of its instant application for leave to appeal that MTT Docket No. 261431 "never culminated in a valid final judgment before Docket [No. 307906] was dismissed," it conveniently omits any reference to the fact that the grounds presented in its application for leave to appeal from the final decision of MTT in Docket No. 261431 were deemed to be lacking in merit by the Court of Appeals in its Order of August 13, 2004 (A14) - - an Order that pre-dated the MTT's dismissal of Docket No. 307906 by eight months (A11).[3]

Highland's argument that the MTT's March 19, 2004 Opinion and Judgment (A1) is not "final" for purposes of collateral estoppel is predicated on the erroneous assertion that "final" has the same meaning in the contexts of appeals as of right and the application of preclusion doctrines. In fact, while an otherwise "final" decision of a court or tribunal may not be appealable as of right because the case in which it is issued is consolidated with another case,[4] it will be deemed "final" for purposes of the preclusion doctrines of res judicata and collateral estoppel if it is sufficiently firm to be accorded preclusive effect and is not tentative, provisional or contingent. See, Restatement 2d of Judgments, § 13 and Comment b thereto; See also, Sherman v Jacobson, 247 F Supp 261 (SDNY 1965), in which the court expounded upon the

[3] The Michigan Court of Appeals has consistently held that the denial of an application for leave to appeal "for lack of merit in the grounds presented," as opposed to a denial for "failure to persuade the Court of the need for immediate appellate review," is a decision on the merits of the issues raised. See, e.g., People v Hayden, 132 Mich App 273, 297; 348 NW2d 672 (1984); People v Douglas, 122 Mich App 526, 529-530; 332 NW2d 521 (1983); and People v Wiley, 112 Mich App 344, 346; 315 NW2d 540 (1981). Highland did not seek further appellate relief in MTT Docket No. 261431, and it is thereby foreclosed from arguing that the MTT's Judgment in that case is not a final judgment.

[4] Pursuant to the Michigan Court Rules, a judgment that does not dispose of all the claims, and adjudicate the rights and liabilities of all the parties, is not a "final judgment" as defined by MCR 7.202(6) and is thus not appealable as of right under MCR 7.203(A)(1).

reasons for ascribing different meanings to "final" in the appellate review and preclusion doctrine contexts as follows:

> ... "final" in the res judicata or collateral estoppel sense is not identical to "final" in the rule governing the jurisdiction of appellate courts. An examination of the policies underlying res judicata and collateral estoppel and the requirement that judgments be "final" to be appealable shows why this is so. Res judicata is not merely a matter of procedure inherited from a more technical era but is founded on the policy of preventing needless litigation. It is "a principle which seeks to bring litigation to an end and promote certainty in legal relations". The final judgment rule is designed to prevent "enfeebling judicial administration" which would result from "permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment". Effectuation of these policies would clearly be hampered if "final" were given the same meaning in each context. A consistently brood interpretation of the term would flood the appellate courts with piecemeal litigation, while a narrow interpretation would allow a litigant to bring an endless number of lawsuits. It follows, therefore, that "final" for res judicata purposes must be construed in the light of the considerations of that doctrine, rather than be automatically equated with "final" in the final judgment rule.
>
> 247 F Supp at 268 (citations omitted).

Based on the foregoing, it is clear that the consolidation of MTT Docket Nos. 261431 and 266534 had no effect on the "finality" of the MTT's Opinion and judgment in Docket No. 261431 for purposes of the applicability of the doctrine of collateral estoppel, and Highland's contrary argument is a red herring which lacks support. Furthermore, whether and when Docket No. 266534 was severed from Docket No. 261431[5] is not germane to the issue of the finality of the MTT's Opinion and Judgment, as wrongly suggested by Highland at page 44 of its application for leave to appeal, because Docket No. 266534 involves issues separate and distinct

[5] On December 1, 2004, the MTT issued an Order consolidating Docket No. 266534 with Docket No. 307906 (Dkt. No. 18). This Order was entered several months after the Court of Appeals denied Highland's application for leave to appeal in Docket No. 261431 "for lack of merit in the grounds presented" (A14).

from those involved in Docket No, 261431. In sum, Highland confuses "finality" for appeal purposes with "finality" for collateral estoppel purposes, and in so doing advances a flawed argument that should be given short shrift by this Court.

Collateral estoppel applies to bar Highland's attempt to relitigate the issue of whether official or unofficial sewer plan changes made after confirmation of the special assessment roll can serve to excuse Highland's failure to meet the jurisdictional requirements of MCL 205.735(1) and (2). This issue was fully, finally and necessarily determined in MTT Docket No. 261431, and the Court of Appeals below committed no error in so holding. Highland's attempt to argue that the "issues" in Docket Nos. 261431 and 307906 were different because Docket No. 261431 was decided before the Township's Board adopted its May 13, 2004 Resolution formally removing the sewer line traversing Highland's property ignores the full scope of the MTT's decision in Docket No. 261431:

> The Tax Tribunal finds that in our present case, neither the official nor unofficial changes to the *plans* rendered the December 2, 1996 confirmation of the *roll* invalid, nor did it render any assessment on an individual property invalid.
>
> A2, p. 17.

When properly viewed, this ruling is seen to encompass any and all official and unofficial post-confirmation *plan* changes relative to their legal impact on *roll* confirmation and assessments, including the "official" action of the Township's Board on May 13, 2004 ratifying and approving earlier "unofficial" plan changes. Accordingly, the Court of Appeals below did not err in ruling that collateral estoppel barred Highland from once again challenging its December 1996 special assessment for sewer service.

II. THE COURT OF APPEALS CORRECTLY HELD THAT THE MTT LACKED JURISDICTION TO ADJUDICATE HIGHLAND'S CLAIMS THAT THE TOWNSHIP FAILED TO COMPLY WITH THE PUBLIC IMPROVEMENTS ACT AND THAT THE TOWNSHIP SHOULD BE REQUIRED TO BUILD THE SEWER SYSTEM IN A CERTAIN MANNER.

As noted above, Highland sought to revive its failed challenge to its December 1996 special assessment by alleging in MTT Docket No. 307906 that the Township's failure to comply with the Public Improvements Act, MCL 41.721 et seq., in connection with its adoption of the May 13, 2004 Resolution entitled it to now challenge the amount of that assessment. The relief sought in Highland's Petition in Docket No. 307906 was broken down into two separate components: 1) the reduction of Highland's special assessment imposed by confirmation of the roll on December 2, 1996, and 2) declaratory and injunctive relief voiding the sewer plan changes formalized by the Township's May 13, 2004 resolution, determining that the "governing plans" for the project are those adopted by the Township prior to the December 2, 1996 roll confirmation, and ordering the Township to build the project according to the pre-confirmation plans. With respect to the first component of requested relief, the Court of Appeals below properly held that the same was barred by the doctrine of collateral estoppel (see Argument I, supra). As for the second component, the Court of Appeals held that the MTT lacked jurisdiction to award such relief because the claims asserted did not seek review "relating to ... special assessments ..." and did not seek a "refund or redetermination of a tax ..." MCL 205.731(a) and (b); Opinion, p. 6 (A12). In so holding, the Court of Appeals correctly applied the jurisdictional statute to the claims presented in accordance with case law precedent, and Highland's argument to the contrary is without merit.

MCL 205.731 establishes the parameters of the MTT's jurisdiction as follows:

> The tribunal's original and exclusive jurisdiction shall be:
>
> (a) A proceeding for direct review of a final decision, finding, ruling, determination, or order of an agency relating to assessment, valuation, rates, special assessments, allocation, or equalization, under property tax laws.
>
> (b) A proceeding for refund or redetermination of a tax under the property tax laws.

Assuming *arguendo* that the Township Board's May 13, 2004 Resolution (A4) is "a final decision, finding, ruling, determination, or order of an agency", MCL 205.731(a), the Court of Appeals correctly held that Highland's claim that this Resolution's failure to comply with the Public Improvements Act was not a claim for review of an agency decision "relating to ... special assessments ... under property tax laws." MCL 205.731(a). Indeed, a review of the Resolution reveals that it had no effect on the amount of Highland's special assessment or on the availability of sewer service to Highland's property.[6] For this reason, the Resolution did not "relate to" Highland's special assessment.

This conclusion is supported by this Court's decision in Highland-Howell Development Co, LLC v Township of Marion, 469 Mich 673; 677 NW2d 810 (2004), in which it was held that common law tort and contract claims are not within the original and exclusive jurisdiction of the MTT. In Highland-Howell, the claims at issue concerned the Township's alleged breach of a promise to construct the same sewer line involved in the instant case. Relying on the distinctions

[6] At no point during the nearly eight years in which Highland's challenges to its special assessment have been pending in various courts and the MTT has Highland ever explained, or presented authority to support, how the Township could have constructed a sewer line across its property and how Highland could have accessed that line for its own use without some form of an easement agreement. Highland's special assessment for sewer service entitled it to have a sewer line brought to its property, and there is no issue as to whether Highland has received the benefit of this improvement. The fact that, had the parties negotiated some form of agreement entitling the Township to come onto Highland's property to build a sewer line thereon and entitling Highland to tap into that line, an additional benefit beyond the receipt of sewer service may have been received by Highland, is and always has been a red herring in these cases.

drawn in its earlier decisions in Wikman v City of Novi, 413 Mich 617; 322 NW2d 103 (1982) and Romulus City Treasurer v Wayne County Drain Comm'r, 413 Mich 728; 322 NW2d 152 (1982), this Court concluded that an alleged breach of promise to build a sewer line in connection with a special assessment sewer project is not a direct challenge to a special assessment and is not the type of claim that the Legislative intended the MTT's exclusive jurisdiction to encompass. 469 Mich at 676-678.

Just as a common law tort or contract claim arising out of a breach of promise to build a sewer line as part of a special assessment project is not a claim within the MTT's original and exclusive jurisdiction, Highland-Howell, supra, neither is a claim that a change in the sewer line was made in violation of the Public Improvements Act. In both circumstances, there is no direct challenge to a special assessment and there is no issue concerning the factual underpinnings of taxes because resolution of the claim has no effect on the amount of the property owner's special assessment or its receipt of sewer service for which the assessment is levied. Accordingly, the Court of Appeals below properly ruled that Highland's challenge to the formal change in sewer plans embodied in the Township Board's May 13, 2004 Resolution was not within the MTT's original and exclusive jurisdiction.[7]

Finally, while Highland's claim for relief arising out of its challenge to the December 2, 1996 special assessment concededly sought a "refund or redetermination of a tax under the property tax laws," MCL 205.731(2), its claim arising out of its challenge to the Township Board's May 13, 2004 resolution did not seek such relief. Accordingly, the Court of Appeals correctly held that Highland's claim concerning the May, 2004 resolution was not within the MTT's original and exclusive jurisdiction as set forth in MCL 205.731(2).

[7] In addition, the alleged legal duty to build the disputed sewer line has been fully and finally adjudicated by the Livingston County Circuit Court in its Opinion and Order of October 15, 2004 (A7), the appeal from which was dismissed by Order of the Court of Appeals dated February 22, 2005 (A10).

III. THE OCTOBER 15, 2004 OPINION AND ORDER OF THE LIVINGSTON COUNTY CIRCUIT COURT BARS RELITIGATION OF THE CLAIMS AND ISSUES RAISED IN THE PETITION IN DOCKET NO. 307906 BELOW AS THEY RELATE TO THE EFFECT OF THE TOWNSHIP BOARD'S MAY 13, 2004 RESOLUTION.

An alternative basis for concluding that the Court of Appeals reached the correct result below lies in the October 15, 2004 Opinion and Order of the Livingston County Circuit Court (A7). In that Opinion and Order, Judge Latreille ruled that the Township had no clear legal duty to construct the disputed sewer line across Highland's property, "especially in light of the subsequent ratification and approval of the 1997 changes." Opinion and Order, p. 7 (A7). Inasmuch as Highland was seeking declaratory and injunctive relief in MTT Docket No. 307906 that would require the Township to build the disputed sewer line, it is apparent that Judge Latreille's final Opinion and Order - - the appeal from which was dismissed by the Court of Appeals on February 22, 2005 (A10) - - precludes the claim on which this request for relief was based under well established principles of res judicata. Sewell v Clean Cut Mgmt, Inc, 463 Mich 569, 575; 621 NW2d 222 (2001); Dart v Dart, 460 Mich 573, 586; 597 NW2d 82 (1999).

IV. HIGHLAND'S APPLICATION FOR LEAVE TO APPEAL FAILS TO DEMONSTRATE A NEED FOR FURTHER APPELLATE REVIEW BASED ON THE STANDARDS SET FORTH IN MCR 7.302(B).

Highland wrongly asserts at page 21 of its application that "[a]n applicant for leave to appeal is entitled to relief upon a showing that its case satisfies one of the six grounds for appeal enumerated in MCR 7.302(B) ..." In truth, the decision to grant or deny an application for leave to appeal is within the discretion of this Court, and "it should not be assumed that leave to appeal

will be routinely granted in every case that might come under one of the specified grounds [in MCR 7.302(B)]." Longhofer, Michigan Court Rules Practice – Text, Vol. 6, pp. 472 – 473. While the Township disputes Highland's claims that meritorious grounds exist for granting the instant application, the establishment of one or more of the grounds specified in MCR 7.302(B) does not automatically entitle Highland to further appellate review.

In its attempt to persuade this Court of the need for further review, Highland grossly distorts the nature and scope of the Court of Appeals' decision below by arguing that it "constitutes a novel interpretation of Act 188 and the Tax Tribunal Act" and "implicates legal issues of major significance because it involves the question of what fundamental due process – procedural and substantive – is owed to property owners when special assessments are levied ..." Application for Leave to Appeal, pp. 22-23. The most egregious of Highland's distortions, however, is its assertion at page 25 of its Application that the Court of Appeals and MTT decisions below "are clearly erroneous" and "result in material injustice" because "Highland was assessed $3.2 million for a benefit it did not receive ..." Nowhere in the record below is there support for the absurd allegation that Highland's property has not been served with the sewer service for which it has been specially assessed, and it is nothing short of irresponsible for Highland to base its entire Application on this wholly unfounded premise. Apparently, Highland believes the only way it can get this Court's attention is to fabricate facts from the record below.

In reality, the Court of Appeals did not "interpret" the Public Improvements Act or the Tax Tribunal Act in a novel manner, nor did its decision involve issues of procedural or substantive due process. A careful, and fair, reading of the Court of Appeals' decision below reveals that its ruling concerning Highland's renewed challenge to the December 2, 1996 special assessment is based on the collateral estoppel effect of the MTT's final judgment in Docket No.

261431, and has nothing to do with an interpretation of substantive law. Moreover, the Court of Appeals' decision regarding Highland's challenge to the Township Board's May 13, 2004 Resolution formally approving and ratifying sewer plan changes resulted from a straight-forward application of Section 31 of the Tax Tribunal Act, MCL 205.731, as interpreted by this Court's decisions in Highland-Howell Development Co, LLC, Wikman and Romulus City Treasurer, supra.

In sum, Highland's hyperbole notwithstanding, the instant application should be denied because it fails to establish a genuine need for further appellate review of the unpublished per curiam decision of the Court of Appeals below. All of the claims and issues raised by Highland in its Petition in MTT Docket No. 307906 have been previously litigated in the MTT and the Livingston County Circuit Court, and appeals from the decisions in those prior proceedings have all been exhausted. The "magnitude of [the] implication" of this case, as wrongly suggested at page 25 of the application, does not extend to "all property owners who are specially assessed" and does not "leave property owners without remedy to challenge a township's post-levy actions," because as Highland well knows, unpublished decisions of the Court of Appeals are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

RELIEF REQUESTED

Highland has failed to demonstrate a need for further appellate review. Its application for leave to appeal should accordingly be denied.

WHEREFORE, Respondent/Appellee Township of Marion prays for entry of an Order denying Highland's application for leave to appeal.

Respectfully submitted,

CLARK HILL PLC

By: 

Neil H. Goodman (P30751)
Attorney for Respondent/Appellee
255 S. Old Woodward, Third Floor
Birmingham, Michigan 48009
(248) 988-5880

Dated: March 31, 2006

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